PUBLIC PROSECUTOR v. CHEW AH HOCK

[A. Cr. J. (Wilson J.) September 6, 1955]

[K. L. — Criminal Appeal No. 66 of 1955]

Prevention of Corruption Ordinance, 1950, s. 3(b) — Sentence — Inadequacy of sentence — Practice of addressing Court on question of sentence.

The accused held a Government contract to supply rice of a specified quality to the aborigines. On the 1st April, 1955 a Department of Aborigines' staff officer inspected the rice supplied and found it to be of inferior quality. He informed the accused that the matter would be reported. On the 9th April, 1955, the accused approached the staff officer and offered him an envelope saying that it was an Easter present of $200. The accused was charged and convicted of an offence under section 3(b) of the Prevention of Corruption Ordinance, No. 5 of 1950, and sentenced to a term of three months' imprisonment. The President in his judgment commented that "Apart from informing the Court that the accused had no previous convictions the prosecuting counsel had nothing to say with regard to sentence."

On appeal the sentence was increased to one of nine months' imprisonment. The mere fact that the prosecutor does not address the Court on the amount of the sentence is immaterial and the practice of asking for a specific sentence is not one which should be encouraged.

MAGISTRATE'S CRIMINAL APPEAL.

E. Brown (Federal Counsel) for the appellant.

Respondent in person.

Wilson J. : — This is an appeal by the Public Prosecutor against the sentence of three months' imprisonment imposed by the learned President in Kuala Lumpur Sessions Court Criminal Case No. 180 of 1955.

The respondent was sentenced to three months' imprisonment for an offence punishable under section 3(b) of the Prevention of Corruption Ordinance, 1950.

In my view, this was a bad case and the sentence was inadequate. The respondent had no previous conviction of any sort. If he had had a previous conviction for an offence of the same type, I do not doubt that he would have received a maximum sentence of imprisonment for this offence. The mere fact that the Public Prosecutor does not address the Court on a question of the amount of the sentence to be awarded is immaterial. For the prosecutor to do more than draw the attention of the Court to such facts as he considers material would, I consider, be improper. One is aware that on the Continent of Europe it is quite usual for a prosecutor to demand a specific sentence. Such a practice is not prevalent in England, and is certainly not allowed before Assize Courts and Quarter Sessions Courts. I do not think that such a practice should be encouraged here.

I accordingly varied the sentence to one of nine months' imprisonment.

Order accordingly.

CHOP KIM LEE SENG KEE v. YEO KIAT JIN

[C. A. (Whyatt C.J., Mathew C.J. (F.M.) and Taylor J.) November 18, 1955]

[Singapore — Civil Appeal No. 13 of 1955]

Defamation — Slander — Qualified privilege — Excessive publication — Malice.

The defendant in this case carried on business in Indonesia as a rubber exporter and he had employed the plaintiff for many years as his commission agent to sell on a 2% commission basis the rubber which he shipped from Indonesia to the Colony. On March 28, 1953 he shipped a consignment of 10 tons to the plaintiff from Rengat, a port in Indonesia by the S.S. Pulau Kidjang and he himself travelled as a passenger on the same ship. When the vessel called at Sapuah, the last port of call in Indonesia on March 29, 1953, the defendant went ashore and there heard from a business man of his acquaintance that the plaintiff had failed in business. When he returned on board, he said to the chief clerk and the tally clerk that he had heard that the plaintiff had failed. This was said in the presence of two sailors, members of the ship's crew. The plaintiff claimed damages for slander. The learned trial Judge dismissed the suit on the grounds that the occasion on which the slander was uttered was one of qualified privilege, and that there was no evidence of malice to defeat the privilege pleaded. The plaintiff appealed.

Held (by Mathew C.J. (F.M.) and Taylor J.): (1) no common interest had been established between the defendant-respondent and the two ship's clerks which made the occasion one of qualified privilege; (2) in any case even if publication to the clerks were defensible, publication to the sailors also was real and exceeded the privilege; (3) the learned Judge was wrong in holding that malice ought not to be inferred in the circumstances, as in fact the defendant's behaviour indicated strongly that he was actuated by malice..

Held (by Whyatt C.J.): the communication to the chief clerk and the tally clerk in this case was privileged but the communication to the sailors constituted excessive publication and was not protected by the law of privilege; (2) as the plaintiff himself has said in evidence that the defendant was not actuated by any improper motive, he had failed to prove that there was malice on the part of the defendant.

Cases referred to:—

(1) *Watt v. Longsdon* (1930) 1 K.B. 130.

(2) *Toogood v. Spyring* 1 C.M. & R. 181 at p. 193.

(3) *Smith v. Streatfield* (1913) 3 K.B. 764.

CIVIL APPEAL.

N. L. Macassey for the appellant.

T. W. Ong for the respondent.

Whyatt C.J. : — The questions for decision in this appeal are whether certain words imputing insolvency to the plaintiff which were spoken by the defendant on board the S.S. Pulau Kidjang on the 29th March 1953 were uttered on a privileged occasion and if they were, whether this privilege was lost by reason of excessive publication, or because of malice on the part of the defendant.

The defendant carried on business in Indonesia as a rubber exporter and for many years prior to the matters complained of in this suit, he had employed the plaintiff as his commission agent in Singapore to sell on a 2% commission basis the rubber which he shipped from Indonesia to the Colony. On the 28th March 1953 he shipped a consignment of 10 tons to the plaintiff from Rengat, a port in Indonesia, by the S.S. Pulau Kidjang and he himself travelled as a passenger on the same ship. When the vessel arrived at Sapuah the last port of call in Indonesia, on the 29th March, the defendant went ashore and there heard from a business man of his acquaintance that the plaintiff had failed. When he returned on board, he said to the chief clerk, Teo Peng Sam (sometimes spelt Teo Pia Sam) and the tally clerk, Ng Chwee Puan, that he had heard that the plaintiff's firm had failed or words to that effect. Although the information ultimately turned out to be incorrect, it led, not unnaturally, to certain difficulties when the plaintiff sought to take delivery of the consignment when it arrived in Singapore. The plaintiff's firm sent their clerk, Goh Kim Kang, to the ship to take delivery of the goods but he was told by Ng Chwee Puan, the ship's tally clerk, that he could not take delivery unless and until he produced a Delivery Order. As he had not been asked for Delivery Orders on previous occasions, he asked why one was required on this occasion and when the tally clerk did not give any explanation, he went on board the vessel and saw Teo Peng Sam, the chief clerk. The latter told him that the reason the rubber was being detained was because the owner of the rubber had said the plaintiff's firm had failed. The plaintiff's clerk replied that this was absolutely unfounded and subsequently when the supervisor of the shipping company, Teck Seng, came on board, he spoke to him and as a result, the supervisor instructed the tally clerk to release the rubber without requiring production of a Delivery Order. The plaintiff's clerk, thereupon, took delivery and later made a report on the whole matter to Soh Piak Yeo, the managing partner of the plaintiff's firm.

Counsel for the defendant has contended that the statement which the defendant made to the chief clerk and the tally clerk of the ship at Sapuah was privileged because both the defendant and the recipients of the statement had a common interest in the insolvency of the plaintiff's firm which justified inter-communication on this subject. It will be convenient to consider first, whether the defendant had an interest in the plaintiff's insolvency, and secondly, whether the recipients of the communication likewise had an interest in that matter.

As I have already mentioned, the plaintiff had acted as commission agent for the defendant for many years and was acting in that capacity in relation to this particular consignment. It was conceded by counsel for the plaintiff, as indeed is obvious, that a person who employs an agent to sell his goods on commission is, generally speaking, interested in whether the agent is solvent or not. But it was said that the present case was wholly exceptional because of the course of business which had been followed between the defendant and the plaintiff in the past and of the financial position resulting from it at the date of this shipment. When the defendant wished to send rubber to Singapore for sale on commission by the plaintiff, he requested the plaintiff by telegram to establish a letter of credit with a bank in Indonesia for the F.O.B. value of the rubber, the latter being ascertained by reference to the Indonesian Government's official selling price. The plaintiff deposited 10% of the amount required with a bank in Singapore who thereupon arranged for their correspondents in Indonesia to open an irrevocable letter of credit without recourse in favour of the defendant. The defendant then shipped the rubber and negotiated a draft for the F.O.B. value of the consignment with the bank in Indonesia and deposited the shipping documents with the bank as collateral security. The shipping documents were forwarded to the bank in Singapore who in my view held them as pledgees until the plaintiff paid off the balance of the letter of credit. After payment of the balance, the bank handed the documents to the plaintiff who proceeded to dispose of the goods on behalf of his principal, the defendant.

The amount realised on the sale might, after deduction of commission and other charges, be less than the amount he had already paid under the letter of credit in which case the nett result would be that the defendant would owe money to the plaintiff on the transaction; on the other hand, if selling conditions were favourable, the plaintiff might realise enough to show a credit to the defendant after accounting for all disbursements. Thus each transaction might produce a debit or a credit in the plaintiff's books, depending upon the market conditions prevailing in Singapore at the time of the sale. At the time of this shipment by the S.S. Pulau Kidjang, the plaintiff's books showed, as a result of previous transactions, a total debit of over $21,000 so that, even if this particular consignment had shown a credit, it would not have been of any immediate cash benefit to the defendant as it would have gone in reduction of the debt of $21,000. Furthermore, the amount of such credit, could not, according to the plaintiff's argument, be affected by the plaintiff's insolvency since under the law of bankruptcy, the defendant would be entitled to set-off against the $21,000 debt, the full amount of

the credit. Hence it follows, so the argument runs, that the defendant could neither lose nor gain by the plaintiff being made bankrupt and therefore he had no interest, one way or the other, in the plaintiff's insolvency.

This argument is based on two assumptions; first, that the law of bankruptcy would operate in the manner suggested, and secondly, that the amount of the credit would necessarily be the same, whether or not the person disposing of the goods was solvent. In order to make good the first assumption, it would be necessary to show that the defendant had not lost his right of set-off by giving credit to the plaintiff after notice of an available act of bankruptcy but the plaintiff did not seek to establish this point, either by evidence or by argument, during the course of the case. In the circumstances, therefore, I am not prepared to find that if this transaction had resulted in a credit due to the defendant, the whole of it could have been set-off against the $21,000 debt, in the event of the plaintiff's bankruptcy. The second assumption is likewise, in my opinion, unwarranted. An insolvent seller is usually a weak seller and therefore the probability is that if the plaintiff had been selling the defendant's goods on commission after it had become known in the market that he was insolvent, he would not have secured as favourable a price as if he had been a solvent seller whose credit was good. In my judgment, therefore, the argument that the defendant had no interest in the plaintiff's insolvency because of the financial arrangements between himself and the plaintiff at this time is unsound. There are, however, in my opinion, other and more positive reasons for holding that the defendant had an interest in the plaintiff's insolvency As I have already mentioned, the defendant had employed the plaintiff as his commission agent for many years past. An owner of goods does not appoint a person at random to act as his commission agent, particularly when the agent is to be employed selling the principal's goods in another country. On the contrary he chooses him especially because he has confidence in his skill and judgment and in his ability to dispose of his goods to the best advantage. It is important, therefore, from the point of view of the principal, once he has chosen his commission agent, that the agent should remain in charge of the disposal of the goods until the sale is completed and not suddenly be superseded by a liquidator or some other person entirely unknown to the principal. The possibility that a liquidator might prove to be as efficient and competent in the disposal of goods as the former commission agent does not affect the matter; the point is that the principal has chosen an individual to handle his goods in whose ability and experience he has confidence and therefore he cannot be disinterested in events which might, against his wishes, result in the appointment of a new and unknown person to dispose of his goods. In my view these considerations are applicable to the relationship which existed between the defendant and the plaintiff at the time of this shipment and in my opinion, therefore, the defendant had an interest in the plaintiff's insolvency at the date of the publication of this slander.

I now turn to consider the second question namely whether the recipients of the communication were also interested in the plaintiff's insolvency. The answer to this question, in my view, depends in the first place upon whether the shipping company had an interest in the matter, and if they had, whether the chief clerk and the tally clerk of the ship were proper persons to receive the communication on behalf of the shipping company. In the ordinary way a shipping company is not greatly concerned about the commercial credit of consignees since goods will not normally be handed over to them unless there has been a proper tender of shipping documents and payment of freight. But where it is the practice to deliver goods without requiring the consignee to produce a bill of lading or even a delivery order, the shipping company clearly runs a considerable risk which might result in heavy loss if ultimately it turns out that delivery has been made to a bankrupt consignee. According to the evidence, this practice prevailed in the present instance and therefore it follows that the shipping company were interested in whether or not the consignee was solvent. That being so, the next question is whether the chief clerk and the tally clerk were the proper persons to receive the communication on behalf of the shipping company.

In my view, the persons, though perhaps not the only persons, to whom a communication of this nature might properly be made are the employees of the shipping company who are responsible for the discharge of the ship's cargo. In a large vessel this would be the chief officer and his assistants but in the case of a small coastal vessel like the S.S. Pulau Kidjang, as appears from the evidence in this case, the functions of the chief officer and his assistants as regards the discharge of cargo are carried out by the chief clerk and the tally clerk. It was the chief clerk, Teo Peng Sam and the tally clerk, Ng Chwee Puan who took the decision to withhold delivery of the rubber in view of the plaintiff's insolvency. It is true that this decision was later overruled by the ship's supervisor when he came on board as a result of representations made to him by the plaintiff's clerk, but in my view, that does not mean that this decision, when it was made, was not a proper one for the chief clerk and

tally clerk to make or that it did not fall within the ordinary scope of their authority. In my judgment, therefore, the chief clerk and the tally clerk were proper recipients on behalf of the shipping company of this communication concerning the plaintiff's insolvency.

Although no argument was specifically directed to the question, it is, in my view, for consideration whether a privileged occasion is sufficiently established merely by showing that the speaker and the recipient each had an interest in the subject matter. It would appear from the authorities, particularly from the judgments in *Watt v. Longsdon*[1], that it must also be shown that the speaker made the communication either for the protection of his own interest or in pursuance of a reciprocal duty between himself and the recipient to communicate on the matter of common interest. In the present case the defendant did not purport to make the communication for the purpose of protecting his interest in the rubber and therefore the communication was not privileged unless it was made in pursuance of a reciprocal duty between himself and the recipient. The difficulty of defining the circumstances which will be sufficient to create such a duty has long been judicially recognised. It was, however, laid down in *Watt v. Longsdon*[1] that the test whether a duty of this nature exists depends on whether right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to make the communication. In my judgment a right-minded person in the position of the defendant in this case, knowing that both he and the shipping company were interested in the insolvency of the plaintiff and honestly believing the information he had received about the plaintiff's insolvency to be true, would have communicated this information to the shipping company. Such a communication would, in my view, be fairly warranted by a "reasonable occasion or exigency", to quote an expression used by Parke B. in *Toogood v. Spyring*[2] and as the learned Judge said in that case :—

> "Such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits".

The privilege attaching to the communication may, however, be lost if it is unnecessarily made in the presence of persons who have no interest in the matter. Counsel for the plaintiff contended that there was unnecessary publication in this case, inasmuch as the communication was made, not only to the chief clerk and to the tally clerk, but also to two members of the ship's crew who were in no way concerned with the delivery of this consignment to the plaintiff. The circumstances in which the communication was made were somewhat remarkable. When the defendant returned from his visit ashore at Sapuah, he sat down at the crew's table on the second deck where the chief clerk, the tally clerk and two other members of the crew were having their midday meal. According to the evidence, the conversation was the normal talk one would expect on such occasions but during the course of it, the defendant made his statement about the plaintiff's insolvency. The remark was not addressed to any one in particular. According to the evidence of the chief clerk "It was made to the company in general." This is not a case, therefore, where a defendant seeks to justify making a defamatory statement in the presence of strangers on the ground that his duty required him to make it at that time and at that place, notwithstanding the presence of the strangers. On the contrary, the defendant made the statement indifferently to strangers and interested parties alike; he made it to every one present, irrespective of who they were or what they did. Thus, what might in certain circumstances have been a privileged communication by the defendant to persons having a material interest in receiving it, turns out to be nothing more than table talk retailed by the defendant "to the company in general". A communication made in these circumstances, is not, in my opinion, protected by the law of privilege.

Having reached this conclusion, it is not necessary for me to consider the further question whether the defendant was actuated by malice but in view of the arguments addressed to the Court on this point, I think it right I should briefly state my view. The plaintiff's principal witness to the slander, the chief clerk, Teo Peng Sam, stated that he thought that what the defendant said about the plaintiff was some sort of warning. He went on to say, in answer to questions put in cross-examination, "I thought the defendant's intention in saying this was good." In view of this evidence of the defendant's good intention given by the plaintiff's witness, it is understandable that the defendant did not call any evidence on the matter. It had been proved out of the mouth of the plaintiff's own witness that the defendant was not actuated by any improper motive. And if there was no improper motive, then, in my view, there was no malice. In my judgment, therefore, the plaintiff's attempt to prove malice failed but for the reasons already given, I am of the opinion that the plaintiff proved excessive publication and consequently his appeal succeeds.

As regards the question of damage, I have had the advantage of reading the judgment of Mr. Justice Taylor on this point and I concur in the view that general damages of $2,000 should be awarded to the plaintiff.

Order that costs be taxed on lower scale but Registrar to exercise special discretion with regard to the separate issue of foreign law. Deposit to appellants' solicitors.

Mathew C.J. (F.M.): — The facts in this case have been so clearly set out by my brother Taylor, whose judgment I have had the advantage of reading and with whose conclusions I entirely agree, that I do not propose to re-capitulate them.

The slander was the imputing of insolvency to the plaintiff-appellant. The learned trial Judge dismissed the suit on the grounds that the occasion on which the slander was uttered was one of qualified privilege and that there was no evidence of malice to defeat the privilege pleaded.

The law on this question is very conveniently set out in *Gatley* on Libel and Slander (3rd edition) at p. 217, where the following passage from the judgment of Bankes J. in *Smith v. Streatfield*[3], (at p. 769) is quoted:—

"The principle upon which the law of qualified privilege rests is this: that where words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so the presumption of malice is rebutted by the privilege, and . . . the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression and conveys in a single word a correct idea of what has really happened, namely, that although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence . . . qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion."

The decisive question in this case is whether the occasion on which the slander was uttered was one of qualified privilege. If the occasion was not one of qualified privilege, malice in the respondent is presumed, and the question of 'excessive publication' does not require consideration, though it may have some effect on the question of damages. I think it as well to set out in full the passage in the judgment of the learned trial Judge in which he deals with the question of qualified privilege:—

"The question of qualified privilege is more difficult. The first two witnesses for the plaintiff undoubtedly had a common interest in the disclosure made, as both of them stated that if they had delivered the rubber to the plaintiff and he had really been insolvent, they would have been personally responsible for its loss to their employers. Counsel for the plaintiff, however, made the point that the defendant had no common interest with these gentlemen, as at the time he made the remark, the plaintiff's part in the sale of the rubber was complete and he stood to lose nothing no matter whether the rubber was sold on his account by the plaintiff or by the Bank, should the plaintiff not be in a position to take up the shipping documents. Any short fall, thus, would in any event be to the account of the defendant. In my opinion there is some substance in this argument, but when one looks at the overall picture of the relations between the plaintiff and the defendant, I do not think that it can succeed. These parties had been trading together in rubber for some seven years prior to this incident, and on many occasions the defendant had been indebted to the plaintiff in large sums of money. At the time of the defendant's defamatory statement he was apparently owing to the plaintiff $20,000 odd (which sum is said to be outstanding today) and in view of their long years of business together with the possibility that if the plaintiff had really been insolvent the defendant might well have been called upon to make good his debt by the Official Receiver, I think there can be little doubt that both the plaintiff's witnesses and the defendant had a common interest in the plaintiff's alleged insolvency. I find thus that the occasion was privileged".

The learned trial Judge arrived at this conclusion on two grounds:—

(1) had the plaintiff in fact been insolvent the two tally clerks to whom the defendant uttered the slander would have been personally responsible to their employers for any loss that might have resulted from the plaintiff's insolvency; and

(2) that in the event of insolvency the defendant might have had to pay to the Official Assignee the $20,000 he owed the plaintiff.

As regards the first ground, it is difficult to see how either the tally clerks or the defendant could be adversely affected by plaintiff's insolvency. The duty of the tally clerks was simple; they handed over the consignment of rubber on surrender of the bill of lading or on presentation of a delivery order. In respect of a number of consignments they handed over the consignment to a trusted consignee with the consent of the supervisor. Their instructions were to hand over against the delivery of certain documents, but even this could be waived by their supervisor and, in fact, no delivery note was presented before this particular consignment was delivered. Both the tally clerks said in evidence that they would be personally responsible if they handed over the consignment to a bankrupt client, but it is difficult to see how this liability would arise and, indeed, the more coherent of the two tally clerks withdrew this suggestion in cross-examination. The tally clerks had to perform the mechanical operation of handing over a consignment against documents, and this they did unless the supervisor ordered them to hand over without documents. The learned trial Judge found as a fact that there was a common interest between the defendant-respondent and the two tally clerks, and he did not consider the position of the defendant-respondent. Perhaps, it is as well to consider it now.

When the rubber was shipped from Sumatra, the defendant had realised the full amount in *rupiahs* of the value of his invoiced consignment, by drawing against a letter of credit opened for him by the plaintiff. When the rubber arrived in Singapore, the plaintiff paid to the Bank what was owing and obtained the shipping documents. He then debited the defendant and sold the rubber, crediting the

defendant with the amount realised less his commission of two per cent. Should the plaintiff be insolvent, all he had to do was to inform the Bank that he had an interest in the consignment and, on payment of what was owing, obtained the shipping documents and the property in the consignment. There can be no doubt that the Bank in Singapore was the legal owner of the rubber. If the price of rubber in Singapore rose, the defendant showed an additional profit on the transaction.

It has been suggested that the defendant controlled the moment that the plaintiff should sell, but this is not borne out by the evidence. The plaintiff had financed the whole transaction, and it was he who sold when he considered the moment favourable. At the time of this transaction the defendant was in debt to the plaintiff to the extent of $21,000. It is difficult to conceive a situation where the insolvency of the appellant could be of interest to the respondent. It is just possible that impending insolvency might induce the appellant to sell immediately rather than to hold for a rise which might result in a greater profit on the sale and thereby a greater reduction in the respondent's debit balance. But, as I have already pointed out, it was the appellant who chose the moment to sell, and I do not think that the hypothetical situation I have suggested is a sufficient basis for establishing a common interest between the appellant and the respondent, on which to found the defence of qualified privilege. In my view, the two tally clerks had no interest in the solvency of the plaintiff-appellant.

As regards the second point, the common interest is based on the proposition that, had the plaintiff become insolvent the defendant would have been compelled by the Official Assignee to pay the amount he owed to the plaintiff. I cannot see that this has any bearing on the question. A debtor must pay his debts and, in my view, he has no interest in the solvency of his creditors. He has to discharge his debts to the creditor and, if the creditor is insolvent, to the person who by law is entitled to collect them.

In my judgment, no common interest has been established between the defendant-respondent and the two tally clerks which made the occasion one of qualified privilege. This being so, it was for the defendant to show that he was not actuated by malice. Far from doing this — he did not even give evidence — his whole behaviour indicated strongly that he was actuated by malice. There was no need for him to utter the words complained of in the presence of the two sailors. During the voyage there must have been an opportunity for him to inform the tally clerks of what he had heard on the quiet. There was no urgency, and therefore no need, for him to make his disclosure at the luncheon table, for there was nothing that either he or the tally clerks could do before the ship arrived in Singapore.

The defendant-respondent had an opportunity to apologise when he was tackled by the plaintiff-appellant. He denied having uttered the slanderous words and, when pressed, avoided the subject and left. He discontinued his business with the appellant although he owed him $21,000. The appellant has, in my view, established malice, though the burden to do so did not lie on him.

I would allow the appeal and enter judgment for the plaintiff for $2,000. The slander is a serious one and merits damages sufficient to mark that an imputation of insolvency in respect of a trader is not a matter lightly to be regarded. I agree with the order proposed by my brother Taylor.

Taylor J.: — This is an action for slander.

Both parties are rubber merchants, the plaintiff in Singapore and the defendant in Sumatra.

Several questions which were controversial in the early stages are not now in dispute and the main facts can be stated shortly.

In March 1953, the defendant shipped a quantity of rubber to the plaintiff and travelled to Singapore in the same vessel, a small local trader. While at table, in a Sumatran port, with two of the ship's tally clerks and two sailors, he used words imputing insolvency to the plaintiff.

The defendant pleads that he spoke the words without malice, believing them to be true, that he addressed them to the tally clerks who had a business interest in the plaintiff's solvency, and that in these circumstances the communication was privileged.

The plaintiff says that the two sailors had no interest in the matter and that publication of the slander to them exceeded the privilege, if any existed.

The issues in dispute are therefore :—

(1) Whether the defendant was actuated by an indirect motive amounting to what is meant by "malice" in this branch of the law;

(2) Whether the defendant and the tally clerks had a common interest in the solvency of the plaintiff and, if so,

(3) Whether the publication to the sailors exceeded the privilege.

The trial Judge negatived malice and excessive publication and held that there was common interest. He accordingly dismissed the suit.

The plaintiff appeals.

In order to appreciate the evidence relevant to these issues it is necessary to examine the business

relations of the parties in some detail. They had been engaged together in the shipment of rubber from Sumatra for about seven years. The trade is subject to foreign exchange control on both sides of the Straits and also to the export price control by which the Indonesian Government protect their economy.

The course of dealing was this The defendant bought rubber in Sumatra and when he had a quantity ready for shipment he informed the plaintiff of the amount of currency required to cover that quantity at the official export price of the day. The plaintiff instructed the Netherlands Bank in Singapore to open a letter of credit for that amount in favour of the defendant. The credit being established with the branch of the bank in Indonesia, the defendant obtained an export permit, shipped the goods, presented the bill of lading and connected documents to the bank and drew against the letter of credit for the full amount of his invoice. On arrival of the ship in Singapore the plaintiff paid the amount due to the bank and debited the defendant. The bank handed him the shipping documents; he took delivery of the rubber from the ship and sold it on the Singapore market. He then deducted his commission of 2% and credited the defendant with the net proceeds. The business obviously depended on the probability that the price obtainable on the free market in Singapore would, more often than not, be appreciably higher than the controlled price at which the rubber was invoiced. As rubber prices fluctuate sharply there must always be a speculative element in such business because shipping and handling would take about a week. This however, was not the only factor. The defendant did not buy the rubber at the controlled price. He bought it from day to day, in relatively small lots, from producers or other dealers and, within the limits of his capital and storage space, he could choose his own time for exporting. If the export price on the day of his permit was above his average cost he had already made and realised a profit when he drew against the letter of credit. Even if the rubber realised a slightly lower price in Singapore he might still show a profit on the transaction as a whole. If the Singapore price was higher than the export price he made an additional profit.

In no event, however, could the marginal difference, whether a profit or a loss, be promptly realised because of the foreign exchange controls. The differences were credited and debited to his running account in the plaintiff's books. In short, his main business was in Indonesian currency in Sumatra and the marginal differences on export built up a dollar account in Singapore. When that account showed a balance in his favour he could use it for other business. If that account was in debit he could pay it off only by shipping further rubber at favourable times.

The plaintiff was little affected by price changes. He was a handling and shipping agent, presumably *del credere,* receiving for his services a flat commission of 2% on the realised price, irrespective of profits and losses. In theory, he took no risk on any particular transaction but if, over a period, the defendant's account went increasingly into debit he had no means of recouping. In practice, therefore, he had no security for debits and relied entirely on the honour of the defendant to continue the business until the account was balanced. On the date of the slander the defendant's account with the plaintiff was in debit for about $21,000.

It is clear that the defendant was in serious financial difficulties at that time because a few weeks later an intermediary negotiated for a composition of about 15%. He managed to weather the storm and is still in business but he never consigned any more rubber to the plaintiff and he has never paid off any portion of the $21,000, though judgment has since been given against him for that amount in a separate action.

The learned trial Judge said that the only indications of malice were the publication of the slander to the two sailors, the fact that the defendant, who had denied malice in his pleadings declined to go into the witness box and the failure of the defendant to retract or apologise. He excused the excessive publication on two grounds. The first was that it was natural for the defendant, in a state of excitement, to blurt out the news of the plaintiff's insolvency to the two tally clerks who were "actively concerned." There was no suggestion at the trial of either excitement or blurting; the evidence tended to negative both; in answer to interrogatories the defendant had explained that he heard the news while he was on shore; he repeated it, in an ordinary voice and manner, after he returned to the ship in conversation during lunch. The second ground was that the excessive publication could have made little or no impression on the sailors, otherwise they would have been called as witnesses. The question whether the hearers of a slander are impressed by it is not the test. The material questions are whether in fact they heard and whether their presence was necessary or unavoidable. The evidence of the two tally clerks was sufficient to prove that the sailors were at the table so no inference adverse to the plaintiff properly arose from their absence.

The point regarding the defendant's failure to give evidence was not accurately stated. It is true that the onus was on the plaintiff but where, as here, there is

some evidence from which malice might be inferred, and the defendant declines to testify, the Court may presume that he could not rebut the inference.

The learned Judge treated the absence of apology as mere bad manners, not suggestive of malice. This is not wholly correct. Apology has a legal, as well as a social, aspect and is relevant to the issue of malice as an indication of the defendant's state of mind. This applies with special force in this case because there is evidence of other contemporary conduct. Two days after the slander, the defendant called at the plaintiff's office. The plaintiff gave him lunch and afterwards asked for an explanation but the defendant merely denied having uttered the slander; the plaintiff then asked when he would pay the $21,000 but the defendant made no reply and left. This evidence was ignored, though the state of mind of two business men can hardly be judged without reference to the state of accounts between them. The defendant was in financial difficulty. If he continued to ship rubber to the plaintiff any profits he might make would be swallowed up by the debit of $21,000. If he changed his agent, such profits would be represented by available cash. He did in fact change his agent before sending his next consignment. If the plaintiff really were insolvent defendant would have good ground for ceasing to trade with him and he would at least gain time before he was pressed to pay off the $21,000. If a man's credit is shaky, spreading news of his difficulties is very likely to bring him down. The only basis for the defendant's statement was a tale told by a member of the crew of another local trade ship.

It may be that each of these points, considered separately, is a small one but in the aggregate they amount to misdirection and non-direction so material as to justify reversal of the finding that malice ought not to be inferred.

On appeal the point was taken that there was no letter before action formally demanding an apology. In view of the defendant's failure to take the very favourable opportunity which the plaintiff so considerately made for him at the meeting which has been mentioned the omission of a merely formal opportunity is insignificant.

The issue of common interest involved two elements. First, whether the defendant had a legitimate interest in the plaintiff's solvency and secondly whether the two tally clerks had such an interest. The two interests need not be identical but they must both exist at the material time.

Counsel for the defendant argued that he, as consignor, had an interest in the solvency of his consignee because, if the plaintiff, as consignee, failed to take up the shipping documents and the bank sold the rubber at a loss, the bank would have recourse to the defendant for the shortage. This argument is completely inapplicable to the facts of this case. The agreed documents show that the bills of exchange were to be expressed as without recourse to the drawer. It is true that the plaintiff was led to admit, in cross-examination, that the defendant might be liable but it is obvious that he had forgotten that proviso; the question ought not to have been put. In his capacity as consignor the defendant was in the position of a paid vendor. The legal ownership of the goods was vested in the bank, as holders of the bills of lading. The learned trial Judge held, however, that because the defendant had often been in debit with the plaintiff, and on that date owed him $21,000 the defendant was interested in the plaintiff's solvency as, if the plaintiff were made bankrupt, the Official Receiver might enforce payment of debts due. This view cannot be supported. The whole of the law is founded on the principle that a man should pay his debts. A debtor has no legitimate interest in the solvency of his creditor. If solvent he pays the creditor direct; if insolvent he pays the same amount to the Official Receiver; financially he is unaffected. On the appeal it was argued that the finding of common interest could be supported on another ground, namely that although the defendant had received the full export price, yet he still had an interest in the marginal profit and that he could direct the plaintiff, as his agent, when to sell and when to hold, whereas in the event of the plaintiff's failure, the bank would sell the rubber, as and when they chose. As regards the plaintiff himself the position in fact was not as suggested in the argument. The correspondence shews that the defendant offered suggestions or advice to the plaintiff as to holding rubber in the hope of the price rising but the plaintiff ignored such suggestions and sold if he, as the man on the spot, judged it wise to do so. It is obvious that this must have been the effective relation at the material date. The plaintiff had to pay for the rubber, in full, from his own money, in order to obtain the shipping documents from the bank. It is true that he debited the defendant with the amount but that meant very little as the account was already in debit and recoupment was remote. The plaintiff had to keep the debit down by selling the rubber at what he judged to be the best opportunity. As regards the bank the situation was substantially the same. Suppose that the defendant's information had been correct and that the plaintiff was in an insolvent position and could not take up the documents. A man cannot be made bankrupt overnight. In that situation the defendant might have gone to the bank and said :—

"I have an interest in this rubber — please do not throw it on the market." The bank would have replied: — "Pay the amount due to us and do what you like with the rubber." It was the obvious and perfect answer. It covered the bank and it protected their customer, the plaintiff, from any further risk. The documents enabled the bank to give a clean title to the goods. But unless the defendant was in a position to finance the holding of the rubber he could neither hold it himself nor direct any one else to do so. The dominant factor in the situation was the debit of $21,000 which covered the possible margin of additional profit on the consignment many times over. The defendant was neither a creditor nor a potential creditor of the plaintiff; he was a substantial debtor to the plaintiff; only in special and unlikely circumstances could the amount of his debit have been increased, owing to the plaintiff's failure. The defendant had no legitimate interest in publishing the plaintiff's alleged insolvency.

On this view of the case the supposed interest of the tally clerks is of little importance but it may be examined briefly. Their duty was to deliver the rubber on surrender of the bill of lading or presentation of a delivery order. On some occasions they had been authorised by their supervisor to deliver similar cargo to the plaintiff without a delivery order and, after a query, this particular consignment was so delivered. They did not, however, repeat to the supervisor the defendant's statement that the plaintiff was on the brink of failure and it was not suggested they were under any duty to do so.

Large shipping companies are more formal and in the absence of a regular delivery order they will not deliver without an indemnity, suitably guaranteed. The solvency of the party taking delivery is not the only factor to be considered on such an occasion; other parties may be affected. The system of the local trade ships is the same but it is within the knowledge of this Court that they do sometimes release cargo on an oral arrangement that the documents will follow. This is an indulgence for the convenience of known and regular consignees. It may therefore be conceded that the owners of the vessel had a legitimate interest in the solvency of the plaintiff and communication of the statement, though it was untrue in fact, to one of their responsible officers, such as the supervisor, might have been privileged. The trial Judge held that this privilege extended to the tally clerks, on the ground that one of them said that if he delivered without documents he would be personally responsible. That statement was qualified in cross examination and the effect of the evidence as a whole was that they had no authority to deliver without documents. It was therefore not shewn that the tally clerks had an interest and the plea of common interest ought to have failed on this ground also.

As regards exceeding the privilege, the trial Judge did not examine the publication of the slander to the two sailors as a matter relevant to this issue; he dealt with it only, as already stated, as one of the considerations relevant to the question of malice. He found, in effect, that publication of the slander to the tally clerks who, as he held, had a common interest in the matter, was privileged and that the additional publication to the two sailors was reasonable. But the test is not whether it was reasonable. The test is whether the presence of additional hearers was unavoidable. In short, was it, for practical purposes, a case of: — then or never? Counsel for the appellant stressed the fact that the ship was about to sail; nothing could be done by anyone until they arrived in Singapore; the defendant had a whole day in front of him during which he could have warned the tally clerks without spreading the imputation among the crew. This is fair comment. There is a further point. The trial Judge thought that publication to the sailors was negligible because they would not be interested. The evidence does not support this view. It appears that the slander was repeated in the coastal ports by sailors and the defendant knew that this might happen because his own information came from the crew of a similar ship. Publication to the two sailors therefore involved a known risk of dissemination. Even if, contrary to the view already expressed, publication to the tally clerks was defensible, publication to the sailors also was real and exceeded the privilege.

For all these reasons the appeal succeeds. No special damage was proved. General damages are lower in slander than in libel. It is not a case for heavy damages but they should be more than nominal. In all the circumstances, and having regard to such few recent cases as are in any way comparable, an award of $2,000 would illustrate the view which this Court takes of the gravity of the slander.

Judgment should therefore be entered for the plaintiff for $2,000 with costs here and below. I would propose that the costs of the trial be taxed on the lower scale but that the Registrar should exercise special discretion with regard to the separate issue of foreign law which required considerable getting up. The deposit should be paid out to the appellant's solicitors.

Appeal allowed.

Solicitors: *Battenberg & Talma; Laycock & Ong.*